IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1501

JAMES JEFFERSON MC LAIN, ET AL
Petitioners,

versus

REAL ESTATE BOARD OF NEW ORLEANS, ET AL
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

INDEX TO AUTHORITIES

INDEX TO AUTHORITIES (Continued)

INDEX TO AUTHORITIES

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OPINIONS BELOW

The opinions, orders and judgment of the District Court (McLain Pet. App. pp. 17a-23a) are reported at 432 F. Supp. 982 (E.D. La. 1977). The opinion of the Court of Appeals (McLain Pet. App. pp. 24a-42a) is reported at 583 F.2d 1315 (5th Cir. 1978).

JURISDICTION

The judgment of the Court of Appeals was rendered on November 15, 1978. A petition for rehearing was denied December 15, 1978 (McLain Pet. App. pp. 42a F.F.). On March 14, 1979 Application for Extension of Time to File Petition for Writ of Certiorari was granted by Mr. Justice Rehnquist, acting as Circuit Justice for the Fifth Circuit. This application extended the time for petitioning for certiorari from March 15, 1979 until April 2, 1979. The Petition For Writ of Certiorari was filed in this Court on March 31, 1979, and was granted on May 14, 1979. Jurisdiction of this Court is invoked under the provisions of 28 USC §1254(1).

QUESTIONS PRESENTED

I. WHETHER a fixed commission equal to six percent of the purchase price of the home charged by all real estate brokers and agents in the Greater New Orleans area on sales of residential real property is a price fix subject to control under the anti-trust laws of the United States.

II. WHETHER the six percent fixed commission for real estate brokerage services charged by New Orleans area realtors in residential real property sales has a "substantial effect" upon the interstate commerce aspects of such transactions.

III. WHETHER buyers and sellers of homes in the Greater New Orleans area, and by implication,

throughout the United States, should have the advantage of fee-price competition in determining their choice of a real estate agent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article I §8 of the Constitution of the United States provides in pertinent part that:

> The Congress shall have Power
>
> . . . .
>
> to regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes;
>
> . . .

B. 15 USC §1 provides in pertinent part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.

C. 15 U.S.C. §15 provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue there-

for in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of this suit including a reasonable attorney's fee.

D. 15 U.S.C. §26 provides in pertinent part that:

> Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws.

E. 28 U.S.C. §1254(1) provides that:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

STATEMENT

This private anti-trust action was brought by the named plaintiffs[1] individually and on behalf of a class

1 James Jefferson McLain, Douglas Arthur Nettleton, Jr., Raymond Joseph Munna and Irving Hirsch Koch. Plaintiffs McLain and Nettleton are university professors of economics; plaintiffs Munna and Koch are lawyers.

consisting of all persons who bought or sold residential property in the parishes of Orleans and Jefferson[2] during the four years preceding the filing of the suit on October 31, 1975.

Made defendants were two real estate trade associations,[3] six named real estate firms[4] and a defendant class of real estate brokers and agents.[5]

Plaintiffs McLain and Nettleton purchased homes in New Orleans in 1972 and 1974 respectively. Plaintiff Koch sold a home in Orleans Parish in 1973 and purchased another in 1974. Plaintiff Munna bought a multi-family dwelling in Jefferson Parish during 1975. In connection with each of these transactions, one or more of the named defendant realtors provided broker-

2 By population, Orleans and Jefferson Parishes comprise nearly 90% of the New Orleans Standard Metropolitan Statistical Area. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1978*, (Washington, D.C. 1978) p. 941.

3 The Real Estate Board of New Orleans, and the Jefferson Board of Realtors.

4 Gertrude Gardner, Inc., Latter and Blum, Inc., Waguespack and Pratt, Inc., Stan Weber and Associates, Inc., Sandra, Inc. and Isabelle McLeod d/b/a Isabelle C. McLeod Realtors.

5 Complaint (McLain Pet. App. 1a-16a at 7a). The defendant class is alleged to include:

> All Brokers who are Realtors and who transacted business in the Eastern District of Louisiana including but not limited to members and associate members of the Orleans and Jefferson Boards, and who were realtors at any time between the dates October 31, 1971 and October 31, 1975 and who, on information and belief, have provided real estate brokerage services, including a brokerage fee.

age service as buyer's or seller's agent, and in each case the realtor received a fee for his services.[6]

The suit alleges numerous restraints of trade,[7] but the primary averment is that the realtors through their trade associations and otherwise:

> (s)hare in, exchange and artificially maintain fixed commissions and artificially raised prices through trade usage, customs and patterns as evidenced by multiple, listing services and widespread fee-splitting.[8]

Overt acts in furtherance of the alleged conspiracy to fix prices include attendance by realtors at associational meetings, conventions and training programs at which price fixing is discussed, the publication of trade journals and other printed matter which discourage price competition, and participation by realtors in less formal meetings, telephone conversations and the like involving price fixing.[9]

The activities of defendants injure the plaintiffs in that fees and commissions are "raised, fixed and maintained at artificial and non-competitive levels". Inasmuch as the realtors' commission is a percentage of the

6 Complaint (McLain Pet. App. pp. 2a-3a, 5a-7a)

7 *Id.* at 10a-11a.

8 *Id.*

9 *Id.*

purchase price of the house, the presence of this artificial, non-competitive element of price both increases the cost of the house and reduces the proceeds of the sale received by the seller.[10]

At present, New Orleans area realtors charge six percent on the first hundred thousand dollars of the price and thereafter charge four percent.[11]

10 *Id.*

11 There is no evidence in the record to support this contention as to the actual percentage charged by New Orleans area realtors. It is however a matter of common knowledge which, to the extent that it has been relevant in the proceedings to date, has been judicially noticed. In any event, present counsel for plaintiffs referred numerous times to the six percent figure at oral argument in the fifth circuit, in his petition for re-hearing in that court, in his application for extension of time in this Court and in his Petition for Writ of Certiorari in this Court. None of the fifteen lawyers variously representing the several defendants has ever challenged the accuracy of the six percent figure.

Given the limited scope of discovery permitted by the trial court (see text at notes 19-20 *infra*) it would not have been possible to elicit evidence as to the actual percentages, nevertheless, six percent seems to be a fairly common rate nationwide. See: e.g. *U.S. v. Jack Foley Realty et al*, #78-5013 U.S. Court of Appeals for the Fourth Circuit, slip opinion pp. 15-16. The evidence showed a conspiracy to raise commissions from 6% to 7% in Montgomery County, Maryland; *See Also:* B. Owen, "Kickbacks, Specialization, Price Fixing and Efficiency in the Residential Real Estate Market" 29 *Stanford L. Rev* 931, 947 (1977) "Eighty five percent of new residential listings in San Francisco for the week ending May 31, 1976 specified 6% brokerage fees, the remainder specified" 7% fee or a sliding scale that depended on the size of the transaction. (*See however Id.* at 947-8 n 110—"commissions may be reduced at the time of sale to in order to facilitate the transaction." The data are based upon 154 new listings for the week in question.)

After filing and service of the suit, an initial round of pleadings were exchanged.[12] On January 5, 1976 the court held a status conference, and at that time entered a "pre-trial order" which purported to regulate the progression of the lawsuit.[13]

This order provided that motions directed to service, venue, jurisdiction and the sufficiency of the pleadings were to be disposed of, followed by class certification motions for which limited discovery was permitted. Thereafter answers were to be filed, and plenary discovery on the merits was to commence. The lawsuit never progressed beyond the jurisdictional stage.[14]

Sixty days after the January 5, 1976 conference defendants filed a motion to dismiss for lack of jurisdiction under federal question and diversity, and for failure to state a claim upon which relief could be granted.[15]

This motion was supported by a memorandum and by affidavits of Mr. Dalton Truax, Jr. and Mr. Max

12 Defendants Stan Weber and Isabelle McLeod filed general denial answers, the remaining defendants variously moved for extensions of time. See Docket entries 4-12. A. 7, 11.

13 A. 15.

14 *Id.* The classes were never certified.

15 A. 18.

Derbes, Jr., two officers of the Real Estate Board of New Orleans.[16]

In substance, the affidavits provided that:

(1) there is no requirement, legal or otherwise, that real estate purchases be made with the assistance of a real estate broker;

(2) real estate brokers are not instrumental in securing real estate financing or title insurance;

(3) a real estate broker's primary function . . . is to counsel prospective purchasers and sellers of real estate located in the State of Louisiana with a view toward concluding mutually satisfactory agreements to purchase or sell, and

(4) the broker's function is complete when he or she procures for the client another person qualified either to purchase or sell the property in question.[17]

An initial round of briefing was had on the jurisdictional issue, and oral argument took place, followed by supplemental briefing. The matter was taken under submission. On September 3, 1976 a second confer-

16 *Id.*

17 Respondents Brief in Opposition to Petition for Cert. p. 3.

ence of counsel and the court was held. The motion to dismiss remained under submission.[18]

It was the opinion of the trial court that in order to satisfy the jurisdictional requirements it would be necessary to bring "the facts of this case within the parameters of the Supreme Court's holding in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).[19]

Specifically the court ordered discovery to take place to determine:

> whether, in the first place, *there is the requisite interdependence between the brokerage activity of defendants and the financing and/or insuring of real estate transactions* in the New Orleans area, and secondly, whether there is a substantial involvement of interstate commerce in such real estate transactions via the financing and/or insurance aspects thereof.[20]

During the four months following the September 3,

18 Minute Entry September 3, 1976; A. 76.

19 *Id.*

20 *Id.* (emphasis added). In the reported decision the trial court rephrased the first requirement as follows:

> . . . whether the challenged activity is an essential integral part of the transaction and inseparable from its interstate aspects. 432 F.Supp. 982, 984 and McLain Pet. App. 20a-21a.

1976 conference numerous depositions were taken,[21] and plaintiff served a set of interrogatories[22] to which defendants objected,[23] and which on account of the dismissal were never answered.

Following the close of the limited discovery period,[24] further briefing was submitted and thereafter on May 31, 1977 the suit was dismissed. The dismissal according to the trial court was granted under rule 12 b 6 (failure to state a claim) converted to a summary judgment (Rule 56) to the extent that matters beyond the pleadings were considered.[25]

21 Deposed were:

1. Patrick Turner, Dept. of Housing Urban Development Rec. Doc. 59.
2. Angel Miranda, H.U.D. economist. Rec. Doc. 52.
3. Paul Griener, Loan Officer, U.S. Veterans Administration (this deposition was inadvertently not filed by the court reporter)
4. James Mills, President Lawyers Title Insurance Co. Record Doc. 58.
5. Julian O. Hecker, President Carruth Mortgage Co. Record Doc. 55.
6. Edmond G. Miranne, President, Security Homestead Association, Record Doc. 53.
7. Max Derbes, Jr., President Real Estate Board of New Orleans, Record Doc. 60.
8. Alfred T. Post, Vice President Gertrude Gardner and Co. (Like the deposition of Mr. Greiner, Mr. Post's deposition never found its way into the record.)
9. Stan Weber, President, Stan Weber and Associates, Record Doc. 61.

22 Docket Entry 39; A. 99.

23 Docket Entry 49; A. 117.

24 Additional Status Conferences were held October 13, 1975 and January 13, 1977.

25 McLain Pet. App. 23a n 7.

In the Court of Appeals, the dismissal was affirmed although procedurally re-characterized as a 12(b)(1) "factual attack" upon subject matter jurisdiction.[25]

SUMMARY OF ARGUMENT

Petitioners present three arguments in support of a jurisdictional finding in this case:

I

Petitioners submit in their first argument that the Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 is relevant in the instant case only to the extent that it identifies aspects of interstate commerce which must be shown to be involved in the local real estate market in order for antitrust jurisdiction to exist.

The *Goldfarb* Court identified financing and governmental loan guarantee activities as involving significant amounts of interstate commerce so that under an implicit "class of activities" rationale the financing transactions were characterized in *Goldfarb* as "interstate transactions."

The title search in *Goldfarb* was then held to be an "integral part" of such transaction. Like its predecessor *United States v. Yellow Cab*, 332 U.S. 218, *Goldfarb* is an "in commerce" case.

26 McLain Pet. App. 25a n 1 and 40 a. *Cf. Mortensen v. First Federal Sav. and Loan Ass'n.*, 549 F.2d 884, 890-91 (3d Cir. 1977).

Petitioners contend that jurisdiction over realtors may not be found via an "in commerce" approach. Jurisdiction over the activities of realtors may be found through the application of the "affectation of commerce" doctrine of *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, and its progeny.

Goldfarb however held only with respect to the interstate aspects of the land market located in Fairfax County, Virginia, and to that extent *Goldfarb*, for jurisdictional purposes, requires a showing that significant interstate aspects attend the functioning of the land market in the locality in which the suit is brought — in this case Greater New Orleans, Louisiana. Once this showing is made, application of either "in commerce" or "affectation of commerce" methodology may be made to show the connection between the local activity at issue and the involved streams of commerce.

The dismissal of this case was based upon misapplication of the "in commerce" methodology of *Goldfarb* and *Yellow Cab* to the "affectation of commerce" situation that prevails with respect to price fixing by realtors.

II

In their second argument, petitioners contend that the real estate market in New Orleans satisfies the *Goldfarb* requirement of possessing significant interstate commerce aspects.

Evidence in the case, indicates that hundreds of millions of dollars in home mortgage funds enter the New Orleans market from sources without the State of Louisiana. In the case of one homestead, millions of dollars of loan capital are obtained annually by periodic borrowing from the Federal Home Loan Bank of Little Rock, Arkansas. These advances are secured by the pledge or delivery of previously executed notes from completed transactions across State lines to the pledgee of the notes. Similarly, local mortgage banks sell their paper in the secondary market.

Whether pledged or sold, the home mortgage note itself becomes an article of commerce, moving across State lines to the pledgee or the new holder, and there, like a magnet, attracts the monthly installment payments due thereunder into channels of interstate commerce. In the secondary market, the new holder of the note amasses these payments and pumps the money across state lines back into the local market or into other local markets as loan capital for subsequent transactions. It does not stretch analogy to suggest that the real estate closing in which the notes are created is like a manufacturing process for these articles of commerce. What then of the role of the realtor who brings buyer and seller together in the manufacturing transaction?

Governmental loan guarantees in the New Orleans area from VA and FHA combined exceeded 1 billion dollars as of 1975. Nationally, the figure exceeds one

hundred billion. The governmental agencies are all headquartered in the District of Columbia.

In addition to financing and loan guarantees — the *Goldfarb* aspects — petitioners have learned that procurement of title insurance is always an interstate transaction for Louisiana residents, there being no domestic title companies. In a single year, one company located in Richmond, Virginia wrote coverage exceeding two hundred million dollars in New Orleans and the surrounding area. Finally, a limited amount of evidence is offered concerning the interstate movement of people.

In the closing part of their second argument petitioners discuss and offer data concerning the scope of the real estate settlement costs problem nationally. Congressional concern is manifested in the language of §2(a) of the *Real Estate Settlement Procedures Act of 1974*, 88 *Stat.* 437. Information obtained from the legislative history of the Act indicates that the total settlement cost bill as of 1974 came to 14 billion dollars annually of which realtors' commissions, the largest single element, accounted for 40%. Ironically, title examination fees were the smallest element, accounting for less than 3%.

The "factual" nature of the second argument provides a basis for the Court to recognize that in New Orleans, in Fairfax County, Virginia and in local real estate markets throughout the United States, significant amounts of interstate commerce are involved. The

Court may also note the ever-widening scope of the real estate settlement cost problem nationally and the leading role realtors play in that problem.

III

Petitioners' third argument seeks to relate the price fixing activities of realtors to identified streams of interstate commerce through an "affectation of commerce" approach.

Petitioners submit that the conceptual difference between "in commerce" and "affectation of commerce" doctrines is significant. "In commerce" cases make the interstate transaction depend upon the local restrained activity, as where the taxi ride between train stations in Chicago is said to be part of an interstate journey.

"Affectation" cases provide the opposite situation in which it is the local activity or market which depends upon the interstate movement of resources into and/or out of the local area. A local restraint operating in the local market, if it is found to unreasonably burden or stifle this movement of resources, is said to "substantially affect" interstate commerce giving rise to federal jurisdiction.

Several examples are drawn from the jurisprudence of this Court including: *Burke v. Ford*, 389 U.S. 320; *United States v. Employing Plasters Ass'n*, 347 U.S. 186; *United States v. Employing Lathers Ass'n*, 347 U.S. 198; *United States*

v. Women's Sportswear Ass'n, 336 U.S. 460; *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, and *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219. All show the characteristic pattern of local market dependence upon identifiable streams of interstate commerce.

The petitioners then discuss the role of the realtor in "making" the local market in land. Realtors merchandise homes. Other than direct sales of new construction by builders and sheriff's sales, realtors comprise about the only regular commercial activity devoted to the sale of residential and commercial property. If the local market is dependent upon interstate resources like financing, it is equally dependent upon the primary function of brokers in bringing together buyer and seller.

Given the demonstrated market dependence upon both local and interstate activity, a showing that a restraint upon the local activity substantially affects the interstate will satisfy the "affectation doctrine."

This effect is demonstrable as a matter of law under the *per se* rule of substantive antitrust law which holds that price fixing is so repugnant to the policy of free competition embodied in the Sherman Act, that an adverse effect will be presumed to exist in any market in which the fixed price is a relevant price. Jurisdictionally that avails nothing in a wholly local market like real estate but if the fixed price can be shown to be logically and economically relevant in another market which is

interstate, why wouldn't the substantive presumption of an adverse effect come to one's aid in showing jurisdiction?

The effect can also be demonstrated as a matter of logic and economics. Assuming that the seller raises his price to avoid the effect of the commission, the buyer, given only a fairly limited amount of cash to use as a down payment, must of necessity finance more of the purchase price and then amortize it with interest over a long period of time. If he does not keep the house but decides to sell, he re-enters the market, this time as a seller with a six percent commission of his own to pay — unless he can pass it along to the next buyer who in turn will finance relatively more of the purchase price.

Petitioners submit that the effect upon commerce is clear.

ARGUMENT

I

The Application Of The Court's Decision In The Case Of *Goldfarb v. Virginia State Bar*, 421 U.S. 773, Extends Only To The Identification Of Relevant Streams Of Interstate Commerce Involved In Residential Real Estate Transactions.

In *Goldfarb v. Virginia State Bar*,[27] the Court held that transactions in land, the most local commodity, have

27 421 U.S. 773 (1975).

interstate commerce aspects. Specifically, the Court addressed and resolved the question of "whether the Sherman Act applies to services performed by attorneys in examining titles in connection with financing the purchase of realty."[28] The Court found the Act to be applicable and invalidated the one percent minimum fee which title lawyers in Fairfax County, Virginia were theretofore required to charge under the minimum fee schedule promulgated by their County Bar Association.

The Sherman Act[29] reaches all activities in restraint of trade or commerce among the state, regardless of whether the activities are actually in the stream of commerce, or if not "in commerce" if they substantially affect interstate commerce.[30]

Since in *Goldfarb* the question of the application of the Sherman Act to the real estate market was a matter of first impression,[31] it was necessary for the Court to delineate the areas of interstate commerce involved in an inherently local real estate market.

28 *Id.* at 780.

29 15 U.S.C. Section 1, relevant text set forth *supra* at pp. 3-4.

30 This proposition hardly needs citation but see: *Goldfarb, supra* at 780:

> Our inquiry can be divided into . . . steps did respondents engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce?

31 *Id.*

The Court adopted the trial court's findings[32] that "a significant portion of funds furnished for the purchase of homes in Fairfax County comes from without the State of Virginia", and that "significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia."[33]

Having identified the amounts of interstate commerce as "significant,"[34] the Court, without further discussion, applied an implicit "class of activities"[35] rationale and thereafter referred to all financing aspects of the sale as "interstate transaction(s)."[36]

The streams of interstate commerce were therefore defined and it remained only to relate the title lawyers' activity to such commerce.

This the Court did by finding that lenders require a title examination "as a condition of making the loan,"[37]

32 *Goldfarb* had been tried on its merits, then reversed and dismissed in the Court of Appeal. *Cf.* 421 U.S. 773, 778 FF.

33 *Id.* at 783.

34 "Thus in this class action, the transaction which create the need for the legal services in question *frequently are inter*state transactions." *Id.* at 783-4 (emphasis supplied).

35 For a discussion of the development of the class of activities doctrine:
See: *Perez v. United States*, 402 U.S. 145, 150-154 (1971).

36 Thus a title examination is an integral part of an *interstate transaction. Goldfarb supra* at 784.

37 *Id.*

and concluded that the title examination was an "integral part" of the financing process.

Although the Court sought only a sufficient nexus with interstate commerce and did not specifically denominate *Goldfarb* as either an "in commerce" case or as an "affectation of commerce" case, the characterization of the local activity as an "integral part" of the interstate transaction strongly suggests that *Goldfarb* is an "in commerce" case. This view is supported by the fact that the Court analogized the title examination in *Goldfarb* to the taxi ride between train stations which was the only aspect of *United States v. Yellow Cab Co.*[38] for which Sherman jurisdiction was found to exist.[39]

Indeed, even the Justice Department in *Yellow Cab* sought only a ruling that would make the ride to the station or the ride from the station an *actual part* of the interstate journey. In short, neither *Goldfarb* nor *Yellow Cab* relied upon a showing of "substantial effect" upon commerce as do the line of affectation cases commencing with the *Mandeville Island Farms Case*[40] and most recently re-affirmed in *Hospital Bldg. Co. v. Rex Hospital Trustees.*[41]

The real estate brokers in the instant case stand on a different footing from the title lawyers in *Goldfarb* or

38 332 U.S. 218 (1947).

39 *Id.* at 228-9, cited in *Goldfarb*: 421 U.S. 773, 784 n. 13.

40 *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

41 475 U.S. 738 (1975).

the taxi drivers in *Yellow Cab*. Jurisdiction depends upon a different sort of analytical method than that employed in those two cases. Jurisdiction over realtors may be found via the *Mandeville Island Farms*, "substantial effects" approach.

Interestingly, the lower courts applied and relied upon *Goldfarb* and *Yellow Cab* as the basis for dismissal of this case.[42] Additionally, and with all respect to the panel members, the fifth circuit interpreted this Court's decision in *Burke v. Ford*[43] and in *United States v. Women's Sportswear Association*[44] in ways which are simply wrong.

Of *Burke*, the fifth circuit suggests that:

> (b)ecause the entire liquor traffic . . . in Oklahoma . . . was distributed through the defendants (liquor wholesalers), the alleged restraint operated in an activity that was clearly a 'necessary' and 'integral' part of interstate commerce.[45]

42 From the trial court:
. . . we reiterate the view that it is *only via the Goldfarb analysis* that this action may be said to arise under the Sherman Act. (McLain pet. App. 19 at n. 3).
From the Court of Appeals:
"The distinction *Yellow Cab* draws between integral and incidental activities corresponds to the distinction between *Goldfarb* and the present case. Like the first cab operators . . . (between stations) . . . the attorney in *Goldfarb* were invariable and indispensable components of interstate commerce."

43 389 U.S. 320 (1967).

44 336 U.S. 460.

45 McLain Pet. App. 34 a.

Burke v. Ford however did *not* turn an "in commerce" consideration. The words "necessary" and "integral" although set off in quotes by the fifth circuit do not even appear in the *Burke* opinion. No reading of the *Burke* decision even implies this sort of analysis and with good reason.

Burke v. Ford is undoubtedly an affectation of commerce case. It follows directly from the *Mandeville Island* line of cases. In *Burke* this Court makes no attempt to place the *intrastate* sales of liquor within the stream of interstate commerce in liquor. Had the Court applied an "in commerce" approach in *Burke* its holding would have been inconsistent with *Yellow Cab*. After all, if the ride to the railroad station is not part of the interstate journey why should the intrastate distribution of liquor be part of the interstate movement thereof. The analysis in *Burke v. Ford* is drawn entirely in terms of the economic effects of the reduction in competition in the Oklahoma liquor market in its relationship to purchases from out of state distillers. The language of *Burke* is quoted in the footnote[46] and the analysis is entirely economic. In fact, in a footnote to the *Burke* opinion this Court compares the rate of increase of intrastate liquor sales with the rate of increase in personal income of Oklahoma residents over a corresponding

46 "Horizontal territorial divisions almost invariably reduce the competition among the participants. . . When competition is reduced, prices increase and unit sales decrease. The wholesalers territorial division here almost surely resulted in fewer sales to retailers — hence, fewer purchases from out of state distillers — than would have occurred had free competition prevailed among the wholesalers. 389 U.S. 320, 321-2.

period to show a disparity presumably related to the absence of competition among liquor wholesalers.[47]

Women's Sportswear is the source of the famous quotation by Justice Jackson to the effect that: "(i)f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[48] Clearly, it is not an "in commerce" case.

Although there is certainly no bright dividing line between the "in commerce" and the "affecting commerce" approaches, and while undoubtedly some factual situations may require the application of both approaches, it is clear that the "in commerce" methodology is inapplicable to the present case and reliance by the lower courts on the "in commerce" aspects of *Goldfarb* and *Yellow Cab* was clearly misplaced. To this extent these cases are entirely inapposite.

Petitioners would conclude this portion of their argument by reiterating the premise that the crucial relevance of *Goldfarb* lies in what it said about *land*, and not in what it said about title lawyers and their place in the scheme of things relating to interstate commerce. The relation of the realtors to these interstate aspects is the subject of a later portion of this brief.[49]

47 *Id.* at 321 n.2.

48 336 U.S. 460, 464.

49 See Argument III *infra* at note 101 *ff.*

II

The Local New Orleans Real Estate Market Satisfies The *Goldfarb* Requirement Of Possessing Significant Interstate Commerce Aspects, And Certain Of Those Aspects Are Of Such General, Nationwide Prevalence That They Exist As A Matter Of Law In Residential Real Estate Markets Throughout The United States.

A. *Introductory Statement:*

Goldfarb required a showing that substantial interstate commerce aspects attend the functioning of the real estate market in Fairfax County, Virginia.[50] Such a showing would appear a pertinent first step in any jurisdictional inquiry directed toward a given local real estate market.

Since land is the ultimate local product, the economic boundaries of any land market are plainly a matter of geography. For practically all buyers, the utility of acquiring a home in a given real estate market is a direct function of the proximity of the home to other relevant locations in the buyer's life — such as his place of employment. Likewise, the seller can't choose to sell his house in any market other than the one in which it is located.[51] The term "national real estate market" is

50 See text at notes 31-36 *supra*.

51 The general level of home prices in New York is generally irrelevant to the seller of a home in Mississippi or any place else for that matter.

simply a construct representing the aggregate of all of the geographically discrete local markets. *Goldfarb* arose in a different local market than the present case, and so petitioners would here show that "evidence"[52] in the present case demonstrates that there are significant interstate commerce aspects involved in the New Orleans real estate market just as there are in Fairfax County, Virginia. In addition to evidence concerning the interstate nature of the primary financing and governmental loan activities identified in *Goldfarb*, petitioners have obtained testimony relating to the functioning of the secondary mortgage market, and the interstate procurement of title insurance. Finally, although to a somewhat lesser extent, there is evidence of market factors relating to the interstate movement of people which in the case of realtors involve out of state referrals, participation in national relocation services, and general considerations of societal mobility.[53]

52 The evidence consists entirely of depositions taken pursuant to the limited discovery permitted by the trial court. The court read these depositions but no evidentiary hearing was ever had in this case, respondents claim to the contrary notwithstanding. See Respondents' Opposition to Petition for Writ, at p. 2.

53 Petitioners would caution against attempting to formulate any general theory of the interstate commerce aspects of local real estate transactions which placed too much emphasis upon the movement of people across state lines. Often accidents of geography and certainly factors other than conditions in the local housing market would all play a role in individual decisions to move from one state to another. Certain factors such as financing title insurance and government loan guarantees would appear to prevail in all real estate markets irrespective of location and therefore offer more uniformly applicable criteria.

Whether proof of significant interstate aspects should be required in every case arising in every residential real estate market, or whether this Court should judicially notice that financing, loan guarantees, title insurance and the like are sufficiently prevalent interstate commerce features of any local real estate market so as to eliminate the jurisdictional necessity of such proof in every case is a question to which petitioners would also address themselves in this portion of their brief.

Supplementing the statistical information presented by the United States in its excellent *amicus* brief,[54] petitioners will offer additional data and will urge this court to declare as a matter of law that transactions in residential real estate markets, throughout the United States are possessed of significant interstate aspects.

B. The Interstate Nature of Real Estate Financing.

In accordance with permissible discovery in the lower court, petitioners deposed the presidents of two New Orleans area lending institutions:[55] Security Homestead Association, a savings and loan, and Carruth Mortgage Corporation, a mortgage banking company. Both of these corporations are heavily involved in the financing aspects of residential sales

54 See United States' Brief: pp. 9-10.

55 Mr. Edmond G. Miranne and Mr. Julian Hecker.

transactions. Both do substantial amounts of business and their business requires significant interstate activity.

Security Homestead is one of about 38 savings and loan associations in the New Orleans Area.[56] It is one of the largest Savings and Loan Associations in the State of Louisiana.[57] During the period 1972-1976, it lent a total of one hundred ninety two million five hundred fifty five thousand, two hundred and ninety four ($192,555,294.00) Dollars in five thousand and sixty four (5064) residential real estate closings.[58]

It obtains money from deposits by investors at least some of whom reside out of state.[59] It obtains significant amounts of loan capital by borrowing from its "mother bank",[60] the Federal Home Loan Bank of Little

56 A. 147.

57 A. 123.

58 A. 124. The year by year breakdown is as follows:

Year	Number of Notes	Dollar Amount
1972	724	$22,815,948.00
1973	946	31,724,220.00
1974	798	33,076,400.00
1975	1040	42,814,172.00
1976	1556	62,124,554.00
	5064	$192,555,294.00

59 A. 131. There are thirty six thousand five hundred twenty seven savings accounts.

60 A. 128.

Rock, Arkansas.[61] In order to secure these advances which fluctuate as more money is needed or as portions of the debt are retired, Security pledges home mortgage notes. Pledge is a bailment or delivery of a thing of value to a creditor as security for the debt. Between 1972 and 1976, Security Homestead pledged Three Thousand five hundred eighty four (3584) first mortgage notes for an aggregate value of ninety million four thousand seven hundred thirty six and no/100 ($90,004,736.00) Dollars or about 47% of its total loan production over the same period.[62] Additionally, in late 1975 or early 1976 Security entered the secondary mortgage market and began selling its paper to "Freddie Mac", a subsidiary of the Federal Home Loan Bank of Little Rock. During the first year of this operation some four million dollars in notes were sold.[63]

61 A. 141 only end of year balances are available, these are as follows:

YEAR	DOLLAR AMOUNT
1972	$2,000,000.00
1973	4,500,000.00
1974	12,240,000.00
1975	15,029,500.00
1976	22,729,500.00

62 A. 143. The figures are:

Year	No. Notes Pledged	Amount of Notes
1972	322	$ 6,936,215.00
1973	391	9,137,485.00
1974	899	22,645,395.00
1975	925	23,801,520.00
1976	1047	27,484,121.00
	3584	$90,047,736.00

63 A. 133, Mr. Miranne, president of Security also testified that his company deals with "Fannie Mae", the Federal National Mortgage Association, another quasi governmental secondary mortgage corporation. See: A. 130.

But whether sold in the secondary market or pledged to the Home Loan Bank, a transmittal of the notes across state lines, in this case to Little Rock, Arkansas, is required. A corresponding movement of funds back to Security takes place. The money is used either to fund present commitments or to make future loans. It is a cycle.[64]

In reality the notes themselves become articles of commerce and move across state lines. Analogizing a bit, the real estate transaction which gives rise to the negotiable paper partakes of the nature of a manufacturing process. The question of whether a local manufacturing process is within the reach of Sherman was laid to rest by this court in *Standard Oil*[65] about 70 years ago.

Carruth Mortgage Corporation, the other deponent, is an Arkansas Corporation doing business in Louisiana, Mississippi and Texas.[66] It has three offices in the New Orleans Area. Carruth is a mortgage bank.[67] Its business is to originate home loans, then sell the paper in the secondary market. The loans are closed and then maintained by Carruth until funds are needed to make new loans. At that time, the earlier loans (the inventory) are re-sold principally to "Fannie Mae"

64 A. 159-60.

65 *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

66 A. 175.

67 *Id.* Unlike Security Homestead, a savings and loan association, there are no savings accounts or depositors.

and "Gennie Mae", both quasi governmental corporations involved in the secondary mortgage market. "Fannie Mae" is headquartered in Washington, D.C., but Carruth deals with its Dallas, Texas office.[68]

Over the period 1971-1976 Carruth made home loans in excess of one hundred and fifty million dollars in Orleans and Jefferson Parishes.[69]

The overwhelming majority of home loans made by Carruth are guaranteed by the F.H.A. or V.A. Over the period 1971-1976 seventy nine percent (79%) of the dollar value of home loans made by Carruth in Orleans and Jefferson were guaranteed by either FHA or VA.[70] With respect to F.H.A. loans, Carruth collects and remits premiums for the guarantee to the FHA in Washington, D.C. on a periodic basis for each account.[71]

68 A. 191-92. Also A. 205. Data on the volume of this business was unavailable; however, since there are no depositors or investors to provide capital for future loans, one must presume, that it is the major source of Carruth's loan capital.

69 See A. 206 for a year by year breakdown of loan production in Orleans and Jefferson. See note 70 for totals.

70 *Id.* Relative percentages are as follows:

1972-1976

	Dollar Amount	% of Total
FHA	$ 33,318,475.00	22
VA	86,341,270.00	58
Conventional	31,774,232.00	20
	$151,434,277.00	100

71 A. 190.

Carruth requires title insurance on all home loans it makes.[72] Carruth actively solicits loans from numerous sources but particularly through real estate brokers and agents.[73]

The operations of both of these institutions involve incredibly large amounts of money, much of which moves into Louisiana from sources without the State. The entire operation of the secondary mortgage market depends upon the resale in interstate channels of locally manufactured home loans notes, dependent for their creation upon the buy/sell transaction which depends in most cases upon the activity of the realtor in bringing together buyer and seller.

C. *Title Insurance*

Lawyers Title Insurance Company of Louisiana is a franchisee of Lawyers Title Insurance Corporation of Richmond, Virginia.[74] The local company acts as an agent for the parent insurer.[75] In 1975, Lawyers Title issued two hundred million dollars of coverage on commercial and residential property in the nine "river parishes" of which Orleans and Jefferson Parishes comprise the major metropolitan area.[76]

72 *Id.*

73 A. 199.

74 A. 207.

75 *Id.*

76 A. 209.

Typically the insurance premium is collected by Lawyers Title at the time of the closing, and is later remitted to the parent company in Virginia.[77]

Of the twenty seven title insurance companies writing coverage in Orleans and Jefferson Parishes, all are headquartered outside the State. The one domestic title insurer of which Mr. James Mills, president of Lawyers Title of Louisiana, was aware is no longer in business.[78] Thus for Orleans and Jefferson home buyers obtaining title insurance is always an interstate transaction.

The average premium for title insurance is approximately one percent for a fifty thousand dollar policy although the actual percentage is computed on a sliding scale, depending upon the value of the house and/or the extent of the coverage.[79]

D. *Federal Loan Guarantee Activities*

Available data for VA loan guarantee activities in Orleans and Jefferson Parishes indicate that between 1945 and 1975 the VA insured loans on forty five thousand nine hundred fifteen homes (45,915) for a total value of seven hundred twenty million one hundred ninety two thousand eight hundred thirty seven and no/100 ($720,192,837.00) Dollars.[80]

77 A. 215.

78 A. 216.

79 A. 219.

80 A. 70.

Specifically, between 1973 and 1975 loan guarantees for the two parishes were issued on five thousand three hundred thirty one homes, and the total value guaranteed was One hundred forty five million, six hundred eighty two thousand, eight hundred sixty three and no/100 ($145,682,863.00) Dollars.[81] It should be remembered that the VA guarantees only the first $17,500.00 of the purchase price of each home.

FHA loan guarantees issued between 1934 and 1973 for Orleans and Jefferson Parishes covered fifty one thousand five hundred nineteen (51,519) homes for a total value of six hundred eighty three million nineteen thousand eight hundred twenty three and no/100 ($683,019,823.00) Dollars.[82] Other than new construction, figures on loan guarantees in Orleans and Jefferson for the single year 1973 indicate one thousand forty five loan guarantees for a value of ten million two hundred twelve thousand seven hundred and no/100 ($10,212,700.00) Dollars. New construction is not included because often, particularly in subdivisions, the initial sale of a new home is made by the builder without the involvement of a realtor.

81 A. 71.

82 Original Record at p. 126. The relevant figures are:

HOME MORTGAGES 1973

PARISH	TOTAL INSURED		NEW CONSTRUCTION ISSUED	
	No.	Amount	No.	Amount
Jefferson	1896	$26,838,650.00	1014	$19,779,700.00
Orleans	325	6,267,500.00	162	3,113,750.00
	2221	$33,106,150.00	1176	$22,893,450.00

The figure in the text represents the total insured less the new construction.

E. National Relocation Services, Out of State Referrals, and the Movement of Persons Across State Lines.

The depositions of two area realtors are excerpted in the appendix.[83] Additionally the brief *amicus curiae* filed by the United States offers an excellent discussion of this aspect of interstate activity involved in real estate markets, throughout the nation.[84] Plaintiffs' interrogatories directed to these issues were never answered, and plaintiffs have little to offer by way of evidence in this area.

However, as pointed out previously,[85] patterns of migration into or out of specific local real estate markets would undoubtedly depend upon many factors including accidents of geography. The extent to which migration or emigration occurs within a given local real estate market is probably not sufficiently uniform to provide a general criterion of interstate commerce involvement. Without denigrating the relevance of this factor, plaintiffs would suggest that the financing, title insurance, and governmental loan guarantee activities supply criteria of substantial interstate involvement which are uniformly present in *all* real estate mar-

83 A. 236-287.

84 See United States Brief, *amicus curiae*, pp. 9-10.

85 See footnote 53 *supra*.

kets,[86] and plaintiffs respectfully suggest that these factors should be more important in the formulation of a general theory of interstate involvement in local real estate markets.

F. The Scope of Real Estate Settlement Costs Nationally.

Section 2(a) of the Real Estate Settlement Procedures Act of 1974[87] provides in pertinent part that:

> The Congress finds that significant reforms are needed to insure that consumers throughout the nation . . . *are protected from unnecessarily high* . . . (real estate) . . . *settlement charges.*[88]

Under the Act, "settlement services" are defined to include, ". . . services rendered by a real estate agent or broker."[89]

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86 One case: *United States v. Greater Syracuse Board of Realtors, Inc.*, 449 F. Supp. 887 (N.D. N.Y. 1978) even identifies a stream of commerce in realtors' referral fees. *United States v. Foley*, 1979-1 Trade Cases, ¶ 62577 comments upon the "transient nature of the market," because of its proximity to the District of Columbia.

87 Pub. L. No. 93-533, 88 Stat. 437 (codified) at 12 U.S.C. Section 2601 FF.

88 *Id.* (emphasis added).

89 12 U.S.C. Section 2602(3).

Congressional findings on the extent of charges for settlement services form part of the legislative history of the Act.[90]

Particularly relevant are data contained in the "Additional Remarks of Senator Proxmire" which accompany the Senate Committee Report.[91]

Senator Proxmire's figures are themselves based upon a 1971 joint report of the Department of Housing and Urban Development and the Veterans Administration (HUD-VA Report) which obtained data from 50,605 residential real estate transactions across the nation.[92]

Of the 50,000 plus transactions studied, over 31,000 or about 60% reported payment of a real estate commission "the balance being presumably sold by the owner or builder directly."[93]

For purposes of the report, "settlement charges" included: closing costs, realtors' commissions, points, statutory charges, and pre-paid items such as property taxes and fire insurance.[94]

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90 S. Re. (Banking, Housing and Urban Affairs Committee) No. 93-866, 93d Cong. 2d Sess. (1974), reprinted in (1974) *U.S. Code Cong. and Ad. News* 6546 FF.

91 *Id.* at 6557 FF.

92 *Id.* at 6561.

93 *Id.* at 6562.

94 *Id.*

Real Estate commissions formed the largest single element of the average transaction accounting, according to HUD-VA figures, for approximately 32% of the overall settlement figure.[95]

Taking the HUD-VA figures and projecting them to 1974 with allowance for conventional financing and increases in prices, Senator Proxmire provides data on the total settlement bill on the five million one and two family houses which are sold each year in the United States.[96] An examination of the table set forth in the

95 *Id.* The following figures are given:

AVERAGE CHARGE PER TRANSACTION
BASED UPON 50,605 TRANSACTIONS

ITEM	AVERAGE AMOUNT	PERCENT
Closing Charges	$ 494.00	26%
Realtors' Commission	625.00	32%
Points	454.00	24%
Statutory Charges	65.00	3%
Prepaid Items	299.00	15%
	$1937.00	100%

As mentioned realtors participated in 31,076 of the 50,605 transactions. The $625.00 average figure however is averaged over all 50,605 transactions. According to the report, the average size of the commission on those transactions where one was paid was $1019.00.

96 *Id.* at 6563. The data given are as follows:

ELEMENT OF CHARGE	Total Annual Charge Based On 5 Million Sales Per Year	
	Dollars (Billions)	Percent
Loan Origination fee	$ 1.5	11%
Title Insurance	1.0	7%
Title Examination	.4	3%
Attorney fees	.6	4%
Other Closing Charges	.8	5%
Subtotal Closing Charges	$ 4.3 (subtotal)	30% (subtotal)
Real Estate Commission	5.6	40%
Points	.7	5%
Prepaid items	2.8	20%
Statutory Charges	.6	5%
	$14.0	100%

footnote indicates a total settlement bill at that time of fourteen billion dollars annually.

Again as in the original HUD-VA report realtors' commissions are the largest element, totaling 5.6 billion annually or 40% of the total 14 billion.[97] Interestingly, fees for title examinations are the smallest element of the overall charge amounting to less than 3% of this total.[98]

The conveyancing industry as a whole is traditionally non-competitive. The Real Estate Settlement Procedures Act, in addition to its disclosure requirements, outlawed kickbacks and rebates in that industry.[99] Ironically, in the absence of price competition these "under the table" activities, although rarely inuring "to the benefit of the home buyer," were virtually the only *competitive* forces at work in the industry.[100]

It is time for that to change.

III

The Proper Functioning Of Any Given Local Market In Real Estate Depends Upon The

97 *Id.* The United States brief *amicus curiae* gives a figure of 15 billion in real estate commissions alone. Regardless of which figure is relied upon, the amounts of money involved are staggering.

98 *Id.*

99 12 U.S.C. Section 2607.

100 See: B. Owen, "Kickbacks, Specialization, Price Fixing and Efficiency in Residential Real Estate Markets" 29 *Stanford L. Rev.* 931 n. 4. (1977).

Interstate Movement Of Resources, Particularly Loan Capital Into The Local Market. As A Matter Of Law And Practical Economics, Price Fixing Among Real Estate Brokers And Agents Substantially Affects The Local Real Estate Market And Thereby Affects The Interstate Movement Of Resources Upon Which The Local Market Depends.

A. The Difference between "In Commerce" and "Affectation of Commerce" Approaches to Antitrust Subject Matter Jurisdiction.

Jurisdiction over local activities in restraint of trade may be reached under either the "in commerce" or the "affectation of commerce" approaches. Petitioners submit that significant conceptual differences exist between the two approaches. Under the "affectation theory" consummation of the local transactions must depend in a significant way upon consummation of the interstate activity; in an "in commerce" case, the opposite situation prevails. Also under an "in commerce" approach the dependence of the interstate activity upon the local activity is inevitably procedural and functional; while under the "affectation" theory, the dependence of the local activity upon the interstate activity is generally structural and economic.[101]

101 The analysis may proceed along either "micro" or "macro" economic lines respectively.

In *Yellow Cab*,[102] an "in commerce" case, the Court said that a taxi ride between train stations in Chicago was *part* of an interstate journey.[103] Completion of the interstate journey was procedurally and functionally dependent upon the local, restrained activity. Nothing more needed to be shown. The economic impact of the two cab companies' agreement not to compete upon the interstate rail transportation of people was simply irrelevant. Similarly, in *Goldfarb*[104] when the title examination was declared to be an "integral part"[105] of obtaining the financing "an interstate transaction";[106] a consideration of the economic effects of the price fixing upon home prices became unimportant because: "(t)he fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected."[107] Of course it was affected: consummation of the loan — the interstate transaction — *depended* upon the local title examination. But just because title lawyers are sometimes like cab drivers does not mean that either of them are ever like realtors.

Jurisdiction over the realtors can be reached only under the "affectation doctrine." Just the opposite of "in

102 *United States v. Yellow Cab*, 332 U.S. 218 (1947).

103 (The taxi ride between two stations) . . . must be viewed in its relation to the entire journey. . . So viewed it is an integral step in the interstate movement. *Id.* at 228-9.

104 421 U.S. 773.

105 *Id.* at 784.

106 *Id.*

107 *Id.* at 785.

commerce," the "affectation theory" demands that the local transaction depend upon consummation of the interstate transaction. The interstate aspect must be shown to be an "integral part" of the local market somehow necessary to its successful operation or survival. If this relationship really exists and if it is not frivolous or trivial then local restraints that adversely affect the local market will also adversely affect any interstate movement of necessary resources into or out of the given local market.

For example, in *Burke v. Ford*[108] the local activities involved the wholesale and retail markets in liquor. No liquor is distilled in Oklahoma, therefore the entire *intrastate* liquor market depended upon the interstate movement of liquor into Oklahoma from sources outside. The Court found that horizontal territorial divisions among wholesalers reduced competition in the local market and thus hampered the interstate movement of liquor into Oklahoma because it resulted in fewer local sales and, "hence fewer purchases from out-of-state distillers — than would have occurred had free competition prevailed among the wholesalers." Interstate resources in liquor which would ordinarily enter a freely competitive Oklahoma liquor market were stifled. They may have been diverted to other states; they may not have been sold or even produced at

108 389 U.S. 320.

all, *but*, in any case, they did not flow across the state line into Oklahoma. That's a substantial effect.[109]

In two earlier cases, *Employing Plasters*[110] and *Employing Lathers*,[111] the Court found that local restraints in the building trades caused unreasonable burdens upon the interstate movement of building materials and related supplies into the respective affected area.[112]

The assumption that the operation of the locally restrained building trades depended upon the interstate movement of building supplies into the local Chicago market is implicit in these decisions.

In *United States v. Women's Sportswear Association*[113] the purely local restraint between jobbers and stitching contractors in Boston was susceptible to federal antitrust regulation because, ". . . the industry in Massachusetts subsists on a constant influx of cloth and outgo of garments. . ."[114] This case also has an "in commerce" aspect in that the interstate commerce in finish-

109 And the fact that neither the perpetrator nor the victim was engaged in an interstate activity involving the restraint is also immaterial:

> "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Womens Sportswear Assn.*, 336 U.S. 460, 464.

110 *United States v. Employing Plasters Ass'n.*, 347 U.S. 186 (1954).

111 *United States v. Employing Lathers Ass'n.*, 347 U.S. 198 (1954).

112 Chicago, Illinois.

113 336 U.S. 460.

114 *Id.* at 462.

ed garments of the jobbers was dependent upon the local activity of the stitching contractors. However, continuance of the purely local activity of the stitching contractors did depend upon, and in turn, substantially affect the interstate movement of resources and finished products out of Boston.

Recently in *Hospital Bldg. Co. v. Rex Hospital Trustees*[115] the Court found jurisdiction over a conspiracy to block the local expansion of plaintiff's hospital. Factors of commerce involved the interstate purchase of medicines and supplies; the receipt by plaintiff of revenues from out of state hospitalization insurers, as well as the payment by plaintiff of management fees to its out of state parent corporation.[116] What's more:

> . . . the multimillion dollar financing for the expansion, a large portion of which would be from out of state would simply not take place if the respondents succeed in their alleged scheme.[117]

Here a local hospital was shown to be dependent upon the interstate movement of resources, namely: money, medicines and supplies, a movement that would be stifled or impaired if the expansion was blocked.

115 425 U.S. 738 (1976).

116 *Id.* at 744.

117 *Id.*

Before moving on, petitioners would comment briefly upon *Mandeville Island Farms v. American Crystal Sugar Co.*,[118] the first affectation case. The case involved two separate markets: one local, one interstate. The local market was in sugar beets; the interstate market in refined sugar. The beets never entered the stream of commerce; however, as the court noted, the price paid for the beets was based upon the price obtained for the sugar. Since the fixed price of beets in the local market was a relevant variable in the interstate market in sugar, an effect upon interstate commerce might well have been presumed. In any case, the local commerce in sugar beets depended for its existence upon the movement of refined sugar out of California and into channels of interstate commerce.[119]

The characteristic pattern in "affectation" cases then is a showing that the local market is dependent for its operation upon identifiable streams of interstate commerce, and that if a restraint affects the local market in such a way as to divert, alter, impair or burden the unfettered interstate flow of resources into or out of the local market, Sherman jurisdiction exists.

B. *The Relationship of Real Estate Brokerage and of Interstate Commerce to the Survival and Functioning of Local Real Estate Markets.*

118 334 U.S. 219 (1948).

119 *Id.* at 242.

Petitioners respectfully submit that the activities of realtors are necessary to the survival and proper functioning of local real estate markets.

Petitioners have shown that the survival and proper functioning of local real estate markets also depend upon resources such as money that flow through channels of interstate commerce into and out of the local market.

Consider the function of the realtor:

The role of the realtor[120] in the typical buy/sell transaction includes the following:

1. Obtaining a listing from a potential seller;
2. Locating a potential buyer from multiple listing services, through advertising, national relocation services, etc.;
3. Confecting a purchase agreement usually contingent upon the buyer obtaining financing;
4. Accepting and acting as escrow agent for the earnest money deposit;
5. Often providing assistance and logistical support in moving the transaction toward the act of sale.[121]
6. Attending the Act of Sale;
7. Accounting for deposits held in escrow, and
8. Collecting at the act of sale a commission equal to six percent or more of the purchase price of the home.[122]

120 In a given transaction there may be more than one realtor, a "listing" agent who represents the seller, and a buyer agent. In such cases the commission would be split between the agents.

Further, and in a more general sense, realtors, by bringing together buyer and seller and by assisting in the consummation of the transaction, actually "make" the local market in realty. Other than direct sales of a new construction by builders and sheriffs' sales, real estate brokerage is the only regular commercial channel for the marketing of residential property. Realtors, "provide information about the housing market to buyers and sellers who have no other source of expert knowledge about conditions in that market."[123] As one real estate textbook puts it:

> Brokerage is the largest single specialty of real estate business other than construction and development. Brokerage is also the most visible specialty in real estate because brokers ad-

121 E.g. obtaining appraisals, securing documents, acting as liaison between the parties, the homestead, the lawyers, etc.

122 McLain Pet. pp. 11-12.

123 Cf. B. Owens, "Kickbacks, Specialization Price Fixing and Efficiency in the Residential Real Estate Market." *29 Stanford L. Rev.* 931.

> vertise widely and sales people move freely among the population in search of transactions. . . . Professional know-how is really the product being sold.[124]

In short, realtors "merchandise" homes.[125] If they did not exist, they would have to be invented, or the real estate market would cease to function on a continuing and viable basis.

With respect to the interstate aspects, petitioners contend that financing and title insurance are also necessary to the survival and proper functioning of the local real estate markets. Government data indicate that debt-financing plays a role in nearly 90% of all sales of housing, and statistics show that the total national mortgage debt exceeds 650 billion dollars, nearly a fourth of which (141.7 billion) is guaranteed by one federal agency or another.[126]

Petitioners have previously discussed the significant amounts of interstate commerce involved in the financing, title insurance and loan guarantee aspects of real estate transactions in New Orleans and throughout the United States.[127]

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124 J. Dasso et al., Fundamentals of Real Estate (Englewood Cliffs, N.J.: Prentice Hall, Inc., 1977) 27-8.

125 This expression was used by the deponent, Mr. A. T. Post, whose deposition unfortunately was not filed.

126 See the figures and sources cited in the United States brief, *amicus curiae*, p. 10, n. 14.

127 See text, *supra*, at n. 54-82.

Petitioners now submit that the survival and viability of the local real estate market is economically dependent upon the continuing interstate flow of such resources as loan capital, title insurance, etc. into the local market. Additionally, as previously mentioned, to the extent that primary loan capital is obtained through the resale of notes in the secondary market — an interstate market — the local real estate transaction may be likened to a manufacturing process in which are created valuable articles of interstate commerce necessary to maintain the streams of home new loan funds back into the local market and other local markets in order that subsequent transactions may occur and local markets may thereby sustain themselves.[128]

In summary, the local real estate market is dependent upon both the activities of realtors, and upon the interstate inflow and outgo of resources, particularly money and negotiable paper.

Positing this market dependence upon both local and interstate functions, it remains only to be shown that a restraint operating in the local market activity, as a matter of law and practical economics, has a substantial effect upon those interstate activities upon which the market also depends.

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128 See text, *supra*, at 63-64. Pledging notes to secure future advances of loan capital is another activity in which the closing can be likened to a manufacturing process.

Such a showing will satisfy the "affectation" doctrine.

C. *The Substantial Effect of Price Fixing of Realtors' Commissions On the Interstate Activities Upon Which the Local Real Estate Market Depends.*

"Affectation of commerce" requires that local restrained activity exert a "substantial effect" upon identifiable streams of interstate commerce upon which the local market depends. If the local market does not require or demand that interstate activity attend its proper functioning, or if the local restraint bears *no* significant relationship to the interstate aspects upon which the local market depends, then there is no jurisdiction.[129]

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129 Such situations are difficult to imagine. See for example: *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), a bid rigging case involving local contractors for municipal contracts. Upholding jurisdiction the court remarks:

> . . . where bids are rigged, the price the city will have to pay for the project is artificially increased . . . in two ways. . .
> First, funds for the project come from H.U.D. and its appropriation to the city had to be increased. . . . H.U.D. funds are transferred in interstate commerce, an increase in the amount of money required for this project would inevitably mean that there would be less money available for H.U.D. projects elsewhere in the United States.
> Second, where the city must use more of its available funds to complete the project, it will have less money to expend for other projects requiring the use of goods shipped in interstate commerce.

An example that might satisfy one or the other aspects of the situation in the text is *Save Our Cemeteries, Inc. v. Archdiocese of New Orleans*, 568 F.2d 1074, (5th Cir. 1978) (Old cemetery, municipal ordinance: no more burials).

In any event, as the Seventh Circuit held, in *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n*, 484 F.2d 751, 759, (1973):

> Dismissal . . . (on pleadings and affidavits) . . . should be granted only when the relation of the subject to interstate commerce is clearly nonexistent.

A sentiment with which petitioners heartily agree.

In applying the affectation doctrine, the "soft word" is "substantial." It serves as a way of stating rather than of reaching the conclusion that an activity exerts a sufficient effect upon interstate commerce to justify federal regulation.[130]

Decisions of this Court have continually expanded the jurisdictional scope of the Sherman Act to correspond with "expanding motion of congressional power. . . ."[131] under the Commerce Clause.

So too the criteria of substantiality, always a question of degree,[132] have from time to time been reexamined by the Court.

The Court most recently re-considered the matter in the *Hospital Bldg.* case,[133] the facts of which have previously been stated.[134]

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130 Cf. *Wickard v. Filburn*, 317 U.S. 111, 122 (1942).

131 *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 743 n. 2 (1976).

132 *Santa Cruz Co. v. Labor Bd.*, 303 U.S. 453, 466-7 (1938).

133 *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738.

134 See text, *supra*, at note 115.

There, the Court through Mr. Justice Marshall, unanimously held that:

> An effect can be 'substantial' under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market prices.[135]

The Court went on to define a "substantial effect" as an "unreasonable burden on the uninterrupted flow of interstate commerce, . . ."[136]

Petitioners will advance two contentions in favor of jurisdiction under the "substantial effect" or "unreasonable burden" approach.

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135 425 U.S. 738, 745

136 *Id.* The Court further stated that:
". . . a complaint should not be dismissed unless it appears that the plaintiff can prove *no set of facts* in support of his claim that would entitle him to relief" (*Id.* citing *Conley v. Gibson*, 355 U.S. 41, 45 (1957).
Actually whether it is expressed in terms of "substantial effect" or "unreasonable burden" the activity of finding jurisdiction is result oriented. The real question is whether federal regulation of a particular activity is an "appropriate means" to the attainment of . . . the effective execution of the granted power to regulate interstate commerce" *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (citations omitted). The answer would seem to depend upon whether given an interstate commerce nexus of any degree at all, there is a valid federal interest in promoting the activity which suffers from the restraint — in this case, a Federal interest in seeing that local housing markets become more perfectly competitive. In that respect, the Fifth Circuit's invocation of, "the growing spirit of federalism manifested at all levels of judicial and legislative decision making. . ." (See *McLain Pet.* p. 41a) is unpersuasive in that there is no state or local policy adverse to federal antitrust regulation of realtors.

The first is derived from the *per se* nature of price fixing in substantive anti-trust law;[137] the second is a matter of logic and practical economics.

Simply stated, price fixing is a naked restraint of trade that carries with it a conclusive presumption of an adverse effect upon the relevant market.[138]

The relevant market would be any market in which the "fixed price" is a relevant price.

Assuming the truth of the allegations of petitioners' complaint related to price fixing, the *per se* rule supplies a conclusive substantive presumption of an adverse effect in the local real estate market.

Jurisdictionally this avails petitioners nothing, since by definition a real estate market is a local market. But, the local real estate market is not the only market in which the fixed price is relevant. Petitioners submit that if the price of the house is an economically rele-

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137 *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59.

138 *Id.* and see McLain Pet. p. 9a:
"The aforesaid combination and conspiracy consist of a continuing agreement and concert of action between the defendants to *fix, control, raise* and *stabilize prices for the purchase and sale of real estate* in a knowing arbitrary, unreasonable and unlawful way. (emphasis added)"
In the absence of evidence or even discovery in this substantive area, this ultimate fact allegation should be taken as true. Actually it was controverted by denial in the case of only two of the named realtor defendants, who were the only parties to file answers. A. 7-14.

vant variable in some identifiable and related interstate market, then the *per se* rule with its conclusive presumption of adverse effect will carry over into that market as well.[139]

That the price of the home is a relevant variable in determining the amount financed is a matter of simple logic. The buyer has two sources from which he derives the money to buy his home: his own pocket and the homestead. The down payment plus the amount financed equal the price of the house. Whether home prices were affected by the fixed commission or whether they were freely competitive, the buyer in any single instance would probably have the same amount of money to use as a down payment, namely: as much as he can afford. The difference then between home prices affected by realtors' price fixing, and home prices determined by freely competitive market factos would *have* to be reflected in the amount financed, because that is the *only* area in which the slack can be taken up. It is the only fairly readily changing variable.

What's more, if home prices are increased by price fixing of realtors' commissions — which they have to be unless it's the seller who absorbs the reduction in proceeds occasioned by the commission and thereby becomes the injured party — then over-all market patterns will be altered and some buyers will be driven

139 For example it might have been applied in *Mandeville Island Farms* where the local price of beets was related to the interstate price of sugar. See text at note 118, *supra*.

out of the market because of their simple inability to put down enough cash to equal the difference between the artificially inflated price of the house and 80% of the appraised value which is about the limit of a conventional financing in most New Orleans transactions.

Petitioners have already suggested in their original writ application[140] that since the realtor's six percent comes "off the top" at the time of the act of sale, then assuming no realtor and no 6 percent, "the buyer would obtain an additional six percent equity in his new home by virtue of his original down payment",[141] and would therefore finance less.

So it seems fair to conclude that the price of the house is a primary determinent of the amount financed. The amount financed ordinarily determines the amount of title insurance which the lender will require on its commitment. *Both of these markets are interstate markets and in both of these markets the price of the home is a relevant variable.* Assuming that home prices are affected through price fixing by realtors, then petitioners submit that the *per se* rule provides a conclusive presumption of an adverse effect carried over into the interstate home financing market, the title insurance

140 Cf *McLain Pet.*, p. 14.

141 *Id.*

market, the secondary market, etc., and jurisdiction is thereby established.

Petitioners would close their brief with their second contention that the six percent commission is in itself quantitatively substantial.

Assuming that the seller will raise his price to pass on the realtor's commission, the buyer must finance more of the purchase price and then amortize it with interest. Over a 30 year period at 9½ percent per annum interest, for every dollar borrowed three dollars are repaid.[142] Thus in amortizing the six percent commission, the buyer eventually repays, over the life of the loan, an amount equal to roughly 18% of the price of his home.

Even supposing he doesn't keep the home for thirty years, he must re-enter the market as a seller and the six percent that he is charged when *he* becomes a seller — unless it can be passed on to the next buyer — will eat into any margin of profit that he may derive from the sale. Either way as buyer or as seller or as homeowner making his monthly payments in between, he feels the "pinch", and so does interstate commerce.

CONCLUSION

For the abovegoing reasons, petitioners respectfully pray that the judgments of the United States District

142 Cf. *McLain Pet.*, p. 13.

Court for the Eastern District of Louisiana, and that of the United States Court of Appeals for the Fifth Circuit be reversed, and that this matter be remanded for further proceedings.

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CERTIFICATE

I certify that on the ____ day of July, 1979, three copies of the foregoing Brief for the Petitioners were hand delivered by undersigned counsel to Mr. Harry McCall, lead counsel for Respondents. I further certify that all parties required to be served have been served.

RICHARD G. VINET